

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	MX Group No. 84-145
)	
John Edward Ostlund)	
)	File No. BNP-20040129AMT
Application for a Permit to Construct a New)	Facility ID No. 160949
AM Station at Easton, California, and)	
)	
Hilo Broadcasting, LLC)	
)	File No. BNP-20040127ABN
Application for a Permit to Construct a New)	Facility ID No. 160261
AM Station at Captain Cook, Hawaii)	

MEMORANDUM OPINION AND ORDER

Adopted: December 16, 2015

Released: December 17, 2015

By the Commission:

1. The Commission has before it an Application for Review filed on September 23, 2008, by Hilo Broadcasting, LLC (“Hilo”), an applicant in the AM Auction No. 84 filing window. Hilo seeks review of a September 4, 2008, decision letter (“*Decision*”) by the Media Bureau (the “Bureau”)¹ which: (1) found that the captioned application of John Edward Ostlund (“Ostlund Application” and “Ostlund,” respectively) to construct a new AM station at Easton, California, was entitled to a preference pursuant to Section 307(b) of the Communications Act of 1934, as amended (the “Act”),² over Hilo’s mutually exclusive application (“Hilo Application”) for a new AM station at Captain Cook, Hawaii; and (2) denied reconsideration of the Bureau’s denial of Hilo’s Motion for a waiver of Section 73.182(k)(2) of the Commission’s Rules (“Rules”) and to sever the Hilo Application from the mutually exclusive (“MX”) group.

¹ See *John Edward Ostlund*, Letter, Ref. No. 1800B3-TSN (MB Sep. 4, 2008) (“*Decision*”). See also *Citicasters Licenses, LP*, Letter, Ref. No. 1800B3-LAS-JP (MB Jan. 24, 2008) at 4 (“*January Letter*”). The *January Letter* considered five applications in MX Group 84-145, found that Citicasters Licenses, LP (“Citicasters”) should receive a preference, gave Citicasters the opportunity to file a complete “long form” application on FCC Form 301, and denied Hilo’s Motion to Sever and for Waiver asking the Bureau to waive Section 73.182(k)(2) and to sever its application from the MX group. See *Hilo Broadcasting, L.L.C.*, Motion to Sever and for Waiver (May 26, 2006) (“*Motion*”). Citicasters subsequently withdrew its application, and the Bureau dismissed it. See *Citicasters Licenses, LP*, Letter, Ref. No. 1800B3-LAS/JP (MB Feb. 11, 2008). After the dismissal, Hilo filed a Petition for Reconsideration of the *January Letter*. See *Hilo Broadcasting, L.L.C.*, Petition for Reconsideration (Feb. 25, 2008) (“*Hilo Petition for Reconsideration*”). The Bureau subsequently issued the *Decision*, which reanalyzed the group, determined that Ostlund should receive a Section 307(b) preference, and denied Hilo’s Petition. The Bureau subsequently granted the Ostlund Application and, by public notice, dismissed the Hilo Application as well as those of the other MX Group 84-145 applicants, La Favorita Broadcasting, Inc. (“Favorita”) and Huron Broadcasting, LLC (“Huron”). See *Broadcast Actions*, Rep. No. 47179 (Feb. 24, 2010). Although Hilo did not file a petition for reconsideration of the 2010 dismissal of its application, its Application for Review of the 2008 *Decision* remained pending and preserved its arguments for review.

² 47 U.S.C. § 307(b). The Ostlund proposal received this preference under Priority 4 (other matters) because it proposed to serve significantly more people than any of the other applications in MX Group 84-145. See *Decision* at 3-5.

Upon consideration of the Application for Review and the entire record, for the reasons discussed below, we affirm the *Decision*.

2. We affirm the Bureau's conclusion that Hilo did not provide a sufficient basis for a waiver of Section 73.182(k)(2) of the Rules to extricate its application from the MX group. The staff properly treated the Hilo Application as mutually exclusive in MX Group 84-145 because it was in technical conflict with the prevailing Ostlund Application.³ Hilo sought a waiver of a core technical rule upon which the determination of mutual exclusivity and our competitive bidding regime is based. While Hilo's waiver request relied on the claim that the degree of overlap between its proposal and that proposed in the Ostlund Application was *de minimis*,⁴ grant of the waiver would undermine our procedures for eliminating mutual exclusivity. Rule waivers in this context are not liberally entertained.⁵ As we have explained, we have carefully calibrated a set of procedures to reduce the incidence of mutual exclusivity in a broadcast auction filing window, while remaining faithful to Congress's direction in Section 309(j) of the Act that the Commission use competitive bidding as its primary commercial licensing scheme.⁶

3. Hilo failed to act within the period established for settlements and technical amendments to resolve mutual exclusivities; instead, seven months later, it filed "an extra-procedural motion to resolve the mutual exclusivity through a waiver of the interference limits."⁷ The Commission has previously concluded, and we do so again here, that "our duty to preserve the integrity of the auction process requires the certain and strict application of the auction rules" and that it would be fundamentally unfair to do otherwise.⁸ As the Commission has explained, it is fundamentally unfair to selectively allow an applicant to obtain a construction permit outside the auction process, while requiring all similarly situated applicants to comply with our competitive bidding rules.⁹ Unsuccessful applicants in the AM broadcast service may reapply in a future auction filing window, but a waiver of the procedures for eliminating mutual exclusivity disserves such future applicants. Future proposals could be adversely affected

³ See 47 C.F.R. § 73.182(k)(2). See also *Nelson Enterprises, Inc.*, Memorandum Opinion and Order, 18 FCC Rcd 3414, 3418 (2003) (nighttime interference between AM applicants makes them mutually exclusive without regard to whether applicants are willing to accept the interference); see also *Policies to Promote Rural Radio Service and to Streamline Allotment and Assignment Procedures*, Second Report and Order, 26 FCC Rcd 2556, 2582-83 (2011) ("*Rural Radio*") (codifying the *Nelson Enterprises* policy by explicitly providing that Section 73.182(k) interference standards are applicable in determining nighttime mutual exclusivity between AM applications filed in the same window and finding the policy consistent with Section 307(b)).

⁴ See Hilo Application for Review at 11-12. See also Motion at 3-4.

⁵ See *Robert E. Combs*, Memorandum Opinion and Order, 19 FCC Rcd 13421, 13426 (2004) ("*Combs*") ("we do not liberally entertain rule waivers seeking to extricate certain applications from MX groups, in order to potentially maximize the number of application grants").

⁶ *Id.* See 47 C.F.R. § 73.5002(d) (period for filing settlements or technical amendments to eliminate mutual exclusivities); *AM Auction No. 84 Mutually Exclusive Applications Subject to Auction, Settlement Period Announced for Certain Mutually Exclusive Application Groups, September 16, 2005 Deadline Established for Section 307(b) Submissions*, Public Notice, 20 FCC Rcd 10563 (MB 2005) (MX Group 84-145 eligible for settlement) ("*Auction No. 84 Public Notice*"), *deadline extended, Auction No. 84 Settlement Period and Section 307(b) Submission Deadline Extended to October 31, 2005*, 20 FCC Rcd 14492 (MB 2005).

⁷ See *January Letter* at 4 (explaining that Hilo failed to pursue our "already liberal procedures" for settlements or technical amendments to resolve mutual exclusivities in the AM auction context).

⁸ *Combs*, 19 FCC Rcd at 13426. See also *January Letter* at 4 (the "potential prejudice to applicants that have followed the auction procedures and rules particularly weighs against the grant of Hilo's request").

⁹ See *Combs*, 19 FCC Rcd at 13426.

because, by granting such a waiver, we would effectively exempt other parties from the auction process in an earlier filing window and remove that spectrum from the future window.¹⁰

4. We also reject Hilo's claim that the Bureau was compelled under a "multiple-station grant preference policy" to grant the Hilo Application and one of the other applications from the MX group, rather than selecting only a single application.¹¹ The pertinent Section 307(b) standard, applied to this MX group and in effect for many decades, has no such mandate to grant as many applications as possible.¹² Hilo fails to cite a single case decided pursuant to the currently applicable Section 307(b) comparative analysis which resulted in multiple grants from an MX group. Nor does Hilo address Commission cases that stand for the opposite proposition.¹³ Although, as Hilo notes, the Commission sometimes chose to grant multiple applications many years ago when analyzing applications in comparative hearings, such action occurred under different standards at a time when overall service levels were much lower.¹⁴ Such a policy would be undesirable in the current non-hearing process, for a radio service that has matured.¹⁵ In the Commission's most recent opportunity to revisit and adjust the non-hearing Section 307(b) comparative process for AM auction applicants, the Commission did not propose or consider in any way a Section 307(b) standard that could include multiple grants.¹⁶

¹⁰ See *id.*

¹¹ Hilo Application for Review at 9; see *id.* at 7-11. In its Petition for Reconsideration of the *January Letter*, Hilo claimed that when the Bureau granted a dispositive Section 307(b) preference to Citicasters in the *January Letter*, it should have also granted the Hilo application since it was not mutually exclusive with Citicasters, thereby allowing for multiple grants. See Hilo Petition for Reconsideration at 5-6. See also Hilo Application for Review at 5-6, 7-8. This issue was rendered moot by the withdrawal and dismissal of the Citicasters application and subsequent selection of the Ostlund Application. See *Decision* at 5. See also *supra* n.1. In its Application for Review, Hilo claims that, rather than granting a dispositive Section 307(b) preference to only Ostlund in the *Decision*, the Bureau should have granted both the Hilo Application and any of the other applications that were not mutually exclusive with Hilo, thereby allowing for multiple grants. See Hilo Application for Review at 10-11.

¹² See *Revision of FM Channel Assignment Policies and Procedures*, Second Report and Order, 90 FCC 2d 88, 91-92 (1982) (simplifying Section 307(b) FM analyses to the current four priorities), *extended to AM analyses*, *Alessandro Broadcasting*, Decision, 99 FCC 2d 1, 6 (Rev. Bd. 1984). Hilo provides no basis for its assertion that these priorities are "not decisional in this case." Hilo Application for Review at 8 n.5. The Bureau specifically stated that these priorities would be applied in Auction No. 84. *Auction No. 84 Public Notice*, 20 FCC Rcd at 10565.

¹³ Hilo Application for Review at 9. See *Combs*, 19 FCC Rcd at 13427-28 (explaining that applicant "does not present any case authority for the proposition that Section 307(b) mandates grant of multiple applications in all cases"); *Peoples Network, Inc., Memorandum Opinion and Order*, 19 FCC Rcd 11658, 11658, para. 3 n.13 (2004) (rejecting the argument that a "combination of proposals" must be awarded when there is a Section 307(b) analysis involving several applications).

¹⁴ See Hilo Application for Review at 9 (citing comparative hearing cases, all over 30 years old, in which the Commission granted more than one application after undertaking the standard of review applicable at that time). For example, the most recent case that Hilo cites was decided under a different standard that favored multiple grants to introduce new service to underserved communities. See *Archilla-Marcocci Spanish Radio Co.*, Decision, 101 FCC 2d 522, 526 (Rev. Bd. 1985) (*Archilla-Marcocci*) (considering such no-longer-used factors as provision of local aural services to "as many independent communities as possible"). Moreover, the facts of *Archilla-Marcocci* - grant of three applications to provide a first local transmission service to small rural communities over a single application to provide a first local transmission service to a suburb of a major metropolitan area -- are easily distinguishable from the Priority 4 case at hand, involving communities well-served by existing stations.

¹⁵ See *supra* n.13 and para. 3 (need for strict application of auction rules and rejecting multiple grant approach).

¹⁶ See *Policies to Promote Rural Radio Service and to Streamline Allotment and Assignment Procedures*, Second Report and Order, 26 FCC Rcd 2556, 2572-75 (2011), *clarified*, Second Order on Recon., 27 FCC Rcd 12829 (2012).

5. The Bureau, following existing Section 307(b) procedures, was correct in selecting Ostlund upon determining that Priority 4 governs this proceeding and that Ostlund merits a preference based on service to the greatest number of people. Conversely, selecting Hilo plus one of the non-overlap proposals (either Huron or Favorita) would run counter to this priority because it would result in less population served than the Ostlund proposal standing alone.¹⁷

6. ACCORDINGLY, IT IS ORDERED that, pursuant to section 5(c)(5) of the Communications Act of 1934, as amended, 47 U.S.C. § 155(c)(5), and section 1.115(g) of the Commission's rules, 47 C.F.R. § 1.115(g), the Application for Review IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

¹⁷ See *Decision* at 4 (providing independent population counts by Commission staff"). The Ostlund Application would serve populations of 688,172 in the daytime 0.5 mV/m contour, 614,011 in the daytime 2 mV/m contour, and 665,742 in the nighttime interference-free contour. In contrast, the Hilo Application would serve the fewest people in the MX Group, *i.e.*, populations of 89,568, 33,636, and 33,636 within those same respective contours. The total population served through the grant of the Hilo Application, even when aggregated with that of Huron and/or Favorita would still be much less than that achieved by grant of the Ostlund Application. Thus, cases that Hilo cites from the 1940s, in which grant of two applications would serve more people than grant of one, are not only inapplicable as involving a different standard, but also are factually distinguishable. See *Magnolia Broadcasting Co.*, 12 FCC 14 (1947); *Leonard A. Versluis*, 12 FCC 342 (1947); *George A. Ralston*, 12 FCC 784 (1948).